

September 7, 2001

DECISION

IN RE: DISAFFILIATION OF HOSPICE CARE OF RHODE ISLAND AND LIFESPAN CORPORATION

The Department of Attorney General ("the Department" or "Attorney General") has considered the above-referenced application pursuant to the Attorney General's common law responsibilities with respect to the preservation and protection of the charitable assets of Lifespan Corporation and Hospice Care of Rhode Island. See R.I. Gen. Laws §§ 18-9-1, et seq.; *Israel v. National Board of Y.M.C.A.*, 369 A.2d 646 (R.I. 1997); *Powers v. Home for Aged Women*, 55 R.I. 187, 179 A. 610 (1935). In accordance with the reasons outlined herein, the application is APPROVED WITH CONDITION. In approving this application with condition, the Attorney General notes as follows:

I. BACKGROUND

A. The Parties

The applicants are Lifespan Corporation (hereafter "Lifespan"), a Rhode Island non-profit corporation, which is the sole corporate member of Hospice Care of Rhode Island and Hospice Care of Rhode Island (hereafter "Hospice"), a Rhode Island non-profit corporation specializing in and licensed by the Rhode Island Department of Health as a home health care and hospice services agency.

Hospice is the oldest and largest hospice in the State of Rhode Island and the third oldest hospice in the nation. Volunteers founded hospice in 1976. Since its inception, it has grown into a professional, multidisciplinary health care team providing care for the terminally ill. Hospice provides and administers comprehensive hospice, home care, and inpatient hospice programs in the State of Rhode Island. Effective January 5, 1996, Hospice entered into an affiliation agreement with Lifespan. Lifespan Diversified Services, Inc., a Lifespan affiliate, became the sole member of Hospice and remains the same to date.

Approximately 6 months prior to Hospice joining Lifespan, Hospice established the Hospice Care of Rhode Island Foundation (hereafter the "Foundation") to monitor, administer, and raise contributions for the benefit of Hospice. Since its inception, the Foundation has provided financial support for Hospice and is primarily responsible for fundraising activities

The disaffiliation is supported by both Hospice and the Foundation. Hospice and the Foundation have had an excellent working relationship since the creation of the Foundation. They are both committed to the mission of Hospice and both entities understand that Hospice is dependent upon the Foundation to cover the annual operating deficits which Hospice will likely incur each year. Hospice provides home care services to patients at less than the cost of providing such services. As part of its charitable mission, Hospice treats all patients, appropriate to its program, without regard to the patient's ability to pay. The Foundation has initiated plans to increase its fundraising activities, which is critical for the future financial viability of Hospice.

II. PROCEDURAL HISTORY

At its annual meeting on December 12, 2000, the Lifespan Board of Directors preliminarily discussed actions that would allow Lifespan to change its governance structure and to take other actions which would permit Hospice to become an independent nonprofit corporation. The preliminary discussions provided that Hospice would in effect be reverting to its status

prior to the 1996 affiliation with Lifespan as a free standing, home health, and hospice care provider. After a lengthy negotiation among representatives of Hospice, the Hospice Foundation and Lifespan, the parties received Board of Trustee approval for the proposed Disaffiliation Agreement. Hospice filed a change of effective control application on July 27, 2001 with the Rhode Island Department of Health. A copy of the change of effective control application, together with other requested documents, was forwarded to the Department of the Attorney General ("Department"). In conducting its review of the proposed disaffiliation, the Department received and reviewed documents relating to: (1) the financial condition of Hospice; (2) the financial condition of the Hospice Foundation; (3) the actual and proposed articles of incorporation and by-laws for Hospice and the Foundation; and (4) reports of the financial condition of Hospice and the Foundation. Additionally, representatives of the Department met with Analee Wulfuhle, President of Hospice and Marlene Leroy, Director of the Foundation.

III. REVIEW CRITERIA

Inasmuch as this Department's review of the proposed affiliation was conducted pursuant to the common law authority of the Attorney General, the following criteria were

among those considered in reviewing the proposed disaffiliation of Hospice from Lifespan:

(1) Whether the proposed affiliation will protect the public's interest in trust property given, devised, or bequeathed to the existing entity for charitable, educational or religious purposes;

Whether the proposed transaction results in a significant change in the purposes of the Foundation so that court approval for the change is required;
Whether the officers and directors of Hospice exercised reasonable care, diligence and prudence in performance of their fiduciary responsibilities in connection with the proposed disaffiliation, including, but not limited to, evaluating the prospective fiscal solvency of Hospice as an independent agency.

IV. DISCUSSION

A. Protection of Charitable Assets

It is the Department's opinion that Hospice and the Hospice Foundation have protected their charitable assets. The net assets of the Foundation have risen each of the respective years of the Lifespan affiliation, from \$415,000 in 1996 to \$3,383,000 in 2000. The assets of the Foundation have not been pledged as surety for the \$2.2 million accounts receivable that Hospice agrees to pay to Lifespan, as part of the Disaffiliation Agreement. Hospice and the Foundation have undertaken these measures to assure the financial solvency and viability of the Foundation and Hospice post- disaffiliation. No assets of the Foundation were pledged or otherwise encumbered by the Disaffiliation Agreement.

Change in Foundation Purpose

The present purpose of the Foundation as set forth in its Articles of Incorporation is:

The corporation shall at all times be operated exclusively for charitable, scientific and educational purposes, more specifically for the purpose of supporting and otherwise benefiting and being responsive to the needs of Lifespan Corporation, a Rhode Island nonprofit corporation, and its affiliates, including in particular Hospice Care of Rhode Island.

The proposed amended Articles of Incorporation list the Foundation's purpose as:

Said Corporation is constituted for the purpose of developing and operating a home hospice program in Rhode Island, the aim of which will be to improve the quality of the last days of life of the terminally ill and to ease the burdens of the bereaved.

The amended Articles of Incorporation of the Foundation remove all reference to benefiting and being responsive to the needs of Lifespan Corporation, consistent with its proposed disaffiliation from Lifespan. The Foundation is materially changing the use to which the Foundation's assets can be applied so that a proceeding should be undertaken to obtain court approval for this modification. Although the Foundation is reverting to its former purposes, there is still a material change in the use of the assets so that court approval should be obtained.

Financial Solvency and Prudent Negotiating

Since 1996, Hospice has incurred operating losses in the amount of approximately \$450,000 per year. Hospice is structured so that operating expenses exceed revenue, making Hospice dependent upon charitable donation. During this same period, the assets of the Foundation grew from approximately \$415,000 in 1996 to approximately \$3,383,000 in 2000. The Foundation has covered the losses of Hospice since 1996.

Hospice represents that disaffiliating with Lifespan will be cost efficient for operating Hospice. Operating as a stand alone agency, rather than part of a large health care system with an emphasis on acute care, Hospice projects that it will be able to reduce its operating costs. Much of the administrative overhead of a large organization, such as Lifespan, is not needed for the smaller specialized services of an organization such as Hospice. As part of a large healthcare delivery system, some of Lifespan's policies, such as hiring, were not effective for Hospice and added additional expenses that it would otherwise not have to expend.

Hospice maintains that independence from Lifespan will give Hospice greater flexibility and allow it to be more responsive to the changing needs of its patients. The Foundation has plans to intensively engage in fundraising activities, which is critical for the viability of Hospice as a freestanding, specialized healthcare provider. Hospice management maintains that intensified fundraising activities by the Foundation will help Hospice initiate new and improved programs to meet patient needs. For instance, Hospice intends to develop a palliative care program which would permit patients to receive the benefits of the end of life care of Hospice while still receiving treatment. Additionally, Hospice seeks to expand the pediatric hospice program.

Lifespan maintained an account receivable from Hospice in the amount of \$3,946,000. Under the terms of the Disaffiliation Agreement, Hospice will be responsible to repay to Lifespan the sum of \$2,187,000 with \$100,000 due at the time of the Disaffiliation and a 5 year promissory note for \$2,087,000 at 1% above prime payable to Lifespan. Hospice represents to the Department that its 5 year plan will permit it to satisfy the \$2,187,000 obligation to Lifespan. The parties agreed to transition support services on fee for service basis.

Hospice and Lifespan each had its own counsel and negotiating team, which met and negotiated the Disaffiliation Agreement over several months. Hospice and Lifespan were able to resolve their differences through vigorous negotiations which resulted in an agreement that is fair to all parties. The Department believes that the Foundation and its Board of Directors have exhibited reasonable care in the exercise of its fiduciary duties with respect to the proposed transaction.

V. CONCLUSION

As stated above, the Attorney General is vested with jurisdiction over the review of the proposed disaffiliation between Hospice and Lifespan through his common law powers. The Department of Attorney General has conducted its review. For the reasons stated above, the Department of Attorney General approves the proposed disaffiliation of Hospice Care of Rhode

Island and Lifespan Corporation, with the condition that the Hospice Care of Rhode Island Foundation receive the approval of the Superior Court for the proposed modifications to its corporate purposes.

SHELDON WHITEHOUSE
ATTORNEY GENERAL
FOR THE STATE OF RHODE ISLAND